IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
v.	:	
IFEDOO NOBLE ENIGWE	:	**NO. 92-257**

ORDER & MEMORANDUM

ORDER

AND NOW, this 21st day of June, 2001, upon consideration of Defendant's 28 U.S.C. 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 292, filed November 16, 2000) and the Government's Answer to Defendant's Motion Under 28 U.S.C. § 2255 (Document No. 305, filed June 18, 2001), **IT IS ORDERED** that Defendant's 28 U.S.C. 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 292) is **DENIED**.

MEMORANDUM

I. BACKGROUND

On May 6, 1992, defendant Ifedoo Noble Enigwe ("Enigwe," "defendant" or "petitioner") was charged in a four count indictment with trafficking in heroin. On August 12, 1992, he was convicted by a jury on all four counts and, on August 13, 1993, was sentenced by this Court to, inter alia, 235 months in prison. The conviction and sentence were affirmed by the Third Circuit in an unpublished Memorandum on April 28, 1994.

On August 24, 1994, defendant filed a pro se Motion pursuant to 28 U.S.C. § 2255 seeking to vacate his sentence. After an evidentiary hearing, at which defendant appeared pro se, his Motion was denied by Order dated September 11, 1995. See United States v. Enigwe, Crim. A. No. 92-00257, 1995 WL 549110 (E.D. Pa. Sept. 11, 1995). Defendant's Motion for Reconsideration was denied on March 1, 1996. See United States v. Enigwe, Crim. A. No. 92-00257, 1996 WL 92076 (E.D. Pa. Mar. 1, 1996). On appeal, by Order dated July 23, 1996, the Third Circuit vacated the denial of defendant's § 2255 Motion and remanded the case to this Court for appointment of counsel and further proceedings. On remand, this Court appointed counsel for defendant and conducted a second evidentiary hearing. Thereafter, defendant's § 2255 Motion was again denied; that ruling was subsequently affirmed by the Third Circuit. See United States v. Enigwe, Crim. A. No. 92-00257, 1997 WL 430993 (E.D. Pa. July 16, 1997), aff'd 141 F.3d 1155 (3d Cir. 1998) (No. 97-1632). Defendant's petition to the United States Supreme Court for a writ of certiorari was denied. See Enigwe v. United States, 523 U.S. 1102 (1998) (No. 97-8516).

On January 22, 1998, defendant filed a Letter/Motion to Vacate the "Judgment entered at my sentencing" under Federal Rule of Civil Procedure 60(b)(6) (Document No. 216, filed January 26, 1998). The Court treated this as a second or successive motion under 28 U.S.C. § 2255 and denied the Motion by Order dated February 13, 1998. The Court also denied, by Order dated February 25, 1998, defendant's Reply (Document No. 220, filed February 20, 1998), which was treated, at defendant's request, as a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). Next, the Court denied defendant's Motion for Reconsideration of its Orders of February 13 and February 25, 1998. See United States v. Enigwe, Crim. A. No.

92-00257, 1998 WL 150974 (E.D. Pa. Mar. 30, 1998). Then, in July 1998, the Court denied two additional motions filed by Enigwe: defendant's Motion to Compel the United States Marshals to Return the Money Retained on a Writ of Execution, see United States v. Enigwe, Crim. A. No. 92-00257, 17 F. Supp. 2d 388 (E.D. Pa. 1998), and defendant's Motion for Production of the Grand Jury Ministerial Records, see United States v. Enigwe, Crim. A. No. 92-00257, 17 F. Supp. 2d 390 (E.D. Pa. 1998). Defendant then filed a Motion for Reconsideration of the Court's Orders of July 8, 1998 (Document No. 257, filed July 30, 1998); it was denied by Order dated September 2, 1998. See United States v. Enigwe, Crim. A. No. 92-00257 (E.D. Pa. Sept. 2, 1998).

Defendant filed a Second or Successive Petition for Vacation of Conviction Pursuant to § 2255 (Document No. 258, filed July 30, 1998), which was supplemented by defendant's Additional Claims to Petitioner's Second § 2255 Motion Sub Judice (Document No. 261, filed August 26, 1998). The Court denied these motions by Order dated September 28, 1998 and transferred the motions to the Third Circuit pursuant to 28 U.S.C. § 1631. See United States v. Enigwe, Crim. A. No. 92-00257, 1998 WL 670051 (E.D. Pa. Sept. 28, 1998). By summary order dated June 3, 1999, the Third Circuit denied defendant's application to file a second or successive § 2255 motion. Defendant also filed an Application for Bail Pending Resolution of Petitioner's Habeas Corpus Petition Sub Judice (Document No. 260, filed August 14, 1998); it was denied by Order dated September 3, 1998. See United States v. Enigwe, Crim. A. No. 92-00257 (E.D. Pa. Sept. 3, 1998).

While his second or successive § 2255 petition was pending before the Third Circuit, Enigwe filed Defendant's Motion to Modify Sentence Pursuant to 18 U.S.C. § 3582(c)(2)

(Document No. 272, filed January 6, 1999) and Defendant's Motion for Recusal of Judge (Document No. 273, filed January 28, 1999). After filing the Motion for Recusal of Judge, defendant filed eleven additional motions as follows: (1) Defendant's Rule 60(b)(6) Motion to Vacate This Court's Decision on Section 2255 Motion Entered Against Petitioner on July 16, 1997 (Document No. 274, filed February 10, 1999); (2) Defendant's Second or Successive Petition for Vacation of Conviction Pursuant to § 2255 (Document No. 278, filed January 20, 2000);[1] (3) Defendant's Supplemental Motion to § 2255 Motion Pending Before This Court (Document No. 279, filed March 23, 2000); (4) Defendant's Motion to Dismiss the Indictment Pursuant to Rule 12(b)(2) Fed. R. Crim. P. (Document No. 282, filed June 30, 2000); (5) Defendant's Addendum to the Motions Sub Judice (Document No. 283, filed July 11, 2000); (6) Defendant's Emergency Motion for Bail (Document No. 285, filed July 31, 2000); (7) Defendant's 28 U.S.C. 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 292, filed November 16, 2000);[2] (8) Defendant's Motion to Expedite (Document No. 296, filed January 16, 2001); (9) Defendant's Motion to Dismiss Without Prejudice (Document No. 297, filed January 16, 2001); (10) Defendant's Motion for Bail (Document No. 298, filed February 5, 2001); and (11) Defendant's Motion to Expedite Ruling of This Case (Document No. 299, filed April 4, 2001). By Order dated May 31, 2001, the Court granted Defendant's Motion to Dismiss

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[1] By order dated May 26, 2000, the Third Circuit denied Enigwe's application to file a second or successive 28 U.S.C. § 2255 motion. See In re Ifedoo Noble Enigwe, No. 00-1278 (3d Cir. May 26, 2000) (Document No. 281, filed May 30, 2000).

[2] By order dated December 8, 2000, the Third Circuit ordered that this motion, one of defendant's successive petitions under 28 U.S.C. § 2255, be docketed. The District Court docketed the petition effective November 16, 2000, the date that his application to file a second or successive petition was filed in the Third Circuit. See In re Ifedoo Noble Enigwe, No. 00-3558 (3d Cir. Dec. 8, 2000) (Document No. 291, filed December 11, 2000).

Without Prejudice (Document No. 297, filed January 16, 2001) in which defendant asked that seven (7) of his pending motions be dismissed without prejudice.[3] On June 8, 2001, the Court denied petitioner's Motion for Recusal of Judge. See United States v. Enigwe, 2001 WL 635955 (E.D. Pa. June 8, 2001).

In addition to the numerous motions filed in this Court, after filing his motion for recusal, defendant filed two petitions for a writ of mandamus to the Third Circuit, both of which were denied in unpublished opinions. See In re Ifedoo Noble Enigwe, No. 00-2050 (3d Cir. Jan. 10, 2001) (unreported) (writing that mandamus relief is not available to correct a judge's refusal to recuse himself); In re Ifedoo Noble Enigwe, No. 01-1594 (3d Cir. Apr. 27, 2001) (unreported) (denying without prejudice defendant's request for mandamus relief seeking an order directing the district court to rule on his § 2255 motion).

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[3] The motions dismissed without prejudice pursuant to that Order were as follows:

(1) Defendant's Motion to Modify Sentence Pursuant to 18 U.S.C. § 3582(c)(2) (Document No. 272, filed January 6, 1999);
(2) Defendant's Rule 60(b)(6) Motion to Vacate This Court's Decision on Section 2255 Motion Entered Against Petitioner on July 16, 1997 (Document No. 274, filed February 10, 1999);
(3) Defendant's Second or Successive Petition for Vacation of Conviction Pursuant to § 2255 (Document No. 278, filed January 20, 2000);
(4) Defendant's Supplemental Motion to § 2255 Motion Pending Before This Court (Document No. 279, filed March 23, 2000);
(5) Defendant's Motion to Dismiss the Indictment Pursuant to Rule 12(b)(2) Fed. R. Crim. P. (Document No. 282, filed June 30, 2000);
(6) Defendant's Addendum to the Motions Sub Judice (Document No. 283, filed July 11, 2000); and
(7) Defendant's Emergency Motion for Bail (Document No. 285, filed July 31, 2000).

Presently before the Court is Defendant's 28 U.S.C. 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 292, filed November 16, 2000). For the following reasons, petitioner's motion will be denied.

II. DISCUSSION

Petitioner moves, pursuant to 28 U.S.C. § 2255, to vacate, set aside or correct his sentence, basing his arguments on a recent United States Supreme Court case, Apprendi v. New Jersey, 530 U.S. 466 (2000) ("Apprendi"). In Apprendi, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490.

In this case, petitioner contends that (1) drug quantity is an essential element of the offenses charged and, because the Court failed to submit that issue to the jury, the Court lacked jurisdiction and the indictment must be dismissed and the sentence vacated; (2) the conviction must be reversed because the government failed to prove drug quantity, an essential element of the offenses charged; (3) because the government failed to prove an essential element of the offenses charged, drug quantity, the evidence presented at trial was insufficient to support the conviction and defendant cannot be retried; and (4) even if the conviction stands, petitioner is entitled to be resentenced because the Court imposed sentencing enhancements that were not charged or submitted to the jury, and the Court did not find the government had established the enhancements beyond a reasonable doubt.

A. 28 U.S.C. § 2255 Standard

Title 28 U.S.C. § 2255 ("§ 2255") provides, in pertinent part, as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255. As a preliminary matter, it is noted that although the motion presently before the Court is Enigwe's fifth motion under § 2255, the Third Circuit granted petitioner's application to file a second or successive motion, concluding that his previous § 2255 motion was filed before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and that, under the pre-AEDPA standard, Enigwe had made a prima facie showing of cause and prejudice with regard to his Apprendi claim. See In re Ifedoo Noble Enigwe, No. 00-3558 (3d Cir. Dec. 8, 2000) (unreported). Accordingly, the Court turns to the merits of petitioner's claim.

B. Apprendi v. New Jersey

The Supreme Court's holding in Apprendi requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In this case, petitioner was sentenced to 235 months, a period less than the maximum 20 year sentence allowable under 21 U.S.C. § 841(b)(1)(C),[4] the statute that prescribes the lowest maximum penalty for a violation of

[4] 21 U.S.C. § 841(b)(1)(C) provides that "[i]n the case of a controlled substance in schedule I or II . . . except as provided in subparagraphs (A), (B), and (D), such person shall be

21 U.S.C. § 841(a) that involves heroin. "Because application of the [United States] Sentencing Guidelines in this case does not implicate a fact that would increase the penalty of a crime beyond the statutory maximum, the teachings of Apprendi v. New Jersey, are not relevant here." United States v. Cepero, 224 F.3d 256, 268 n.5 (3d Cir. 2000) (internal citations omitted); see also United States v. Williams, 235 F.3d 858, 863 (3d Cir. 2000) (concluding, in a case where the district court's findings increased the possible statutory maximum sentence, that "Apprendi is not applicable to [defendant's] sentence[] because the sentence actually imposed . . . was well under the original statutory maximum of 20 years").[5] Since petitioner was sentenced to 235 months, which is 5 months less than 240 months, or 20 years, which is the maximum allowable sentence under § 841(b)(1)(C), the Court concludes that Apprendi does not provide a basis for granting the requested relief and petitioner's § 2255 motion is denied on this ground.[6]

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sentenced to a term of imprisonment of not more than 20 years . . . ."

[5] All of the Courts of Appeals are in agreement that Apprendi does not apply where the actual sentence imposed is less than the minimum statutory maximum sentence. See United States v. Baltas, 236 F.3d 27, 40–41 (1st Cir.), cert. denied, 121 S. Ct. 1982 (2001); United States v. Garcia, 240 F.3d 180, 183–84 (2d Cir. 2001); United States v. Angle, 230 F.3d 113, 123 (4th Cir. 2000); United States v. Meshack, 225 F.3d 556 (5th Cir. 2000) (finding judge-made determination of drug quantity permissible where the sentence imposed did not exceed the statutory maximum), cert. denied sub nom. Parker v. United States, 121 S. Ct. 834 (2001); United States v. Corrado, 227 F.3d 528, 542 (6th Cir. 2000); Talbott v. Indiana, 226 F.3d 866, 869–70 (7th Cir. 2000);United States v. Aguayo-Delgado , 220 F.3d 926, 933–34 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000); United States v. Garcia-Guizar, 227 F.3d 1125, 1129–30 (9th Cir. 2000), cert. denied, 121 S. Ct. 1629 (2001); United States v. Hishaw, 235 F.3d 565, 577 (10th Cir. 2000), cert. denied, ___ S. Ct. ___, 2001 WL 487751 (June 11, 2001); United States v. Gerrow, 232 F.3d 831, 834 (11th Cir. 2000); In re Sealed Case, 246 F.3d 696, 698–99 (D.C. Cir. 2001).

[6] In connection with his Apprendi arguments, Enigwe relies on United States v. Spinner, 180 F.3d 514 (3d Cir. 1999), to argue that Apprendi should be interpreted to mean that drug quantity must now be treated as an essential element of a crime involving drugs, and "since the district court by his instruction to the jury, stripped the indictment of an essential element of the

Having concluded that the rule announced in Apprendi is inapplicable to petitioner's case, the Court need not reach the issue of whether the rule announced in Apprendi is retroactively applicable on collateral review of a conviction and/or sentence. See generally Teague v. Lane, 489 U.S. 288, 307 (1989) (holding that new rules of constitutional law are inapplicable on collateral review unless (1) the new rule places certain kinds of primary conduct outside of the criminal lawmaking authority; or (2) the rule requires "the observance of those procedures that . . . are implicit in the concept of ordered liberty") (internal quotations omitted). Although the Third Circuit has not yet ruled on this issue, the Court notes that the majority of courts that have examined the question of Apprendi's retroactivity are in agreement that the rule announced in Apprendi is not retroactively applicable. See, e.g., Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000) ("[I]t is clear that the Supreme Court has not made the [Apprendi] rule retroactive to cases on collateral review."); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000) (holding that the new rule announced in Apprendi does not satisfy the requirements

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offense, the district court's jurisdiction has been destroyed." Mem. of Law in Supp. of Mot. Under § 2255 (Document No. 295, filed January 16, 2001). In support of this proposition, petitioner cites Spinner, 180 F.3d at 515, in which the Third Circuit wrote: "'Happily, the rule that the indictment, to be sufficient, must contain all the elements of a crime . . . is still a vital part of our Federal criminal jurisprudence.'" (quoting United States v. Wander, 601 F.2d 1251, 1259 (3d Cir. 1979)) (internal quotation omitted) (modification in original).

In Spinner, the Third Circuit held that the indictment underlying defendant Spinner's charge was jurisdictionally defective in that it did not allege any effect on interstate commerce, an essential element of the count that charged access device fraud in violation of 18 U.S.C. § 1029(a)(5). The Third Circuit thus concluded that it had "no choice but to reverse and vacate Spinner's conviction so that he may be properly indicted . . . ." Spinner, 180 F.3d at 517. The short answer to Enigwe's Spinner argument is that, unlike Spinner, the Court in this case instructed the jury on all of the essential elements of the crimes charged. Drug quantity, argued by Enigwe to be an essential element under Apprendi, is not an essential element as set forth infra. In addition, in contrast to an effect on interstate commerce—a jurisdictional element required pursuant to 18 U.S.C. § 1029(a)(5)—drug quantity is not jurisdictional.

announced in Teague for retroactivity); Levan v. United States, 128 F. Supp. 2d 270 (E.D. Pa. 2001) (concluding that Apprendi does not apply to cases on collateral review under the AEDPA); United States v. Stewart, ___ F. Supp. 2d ___, 2001 WL 640664 (E.D. Pa. June 7, 2001) (Apprendi not applicable on collateral review); but see United States v. Murphy, 109 F. Supp. 2d 1059, 1064 (D. Minn. 2000) (concluding that Apprendi announced a rule of "watershed importance" and that it falls under the second exception to the Teague bar on retroactivity). Declining to rule on whether Apprendi is retroactively applicable in this case, the Court now turns to petitioner's next contention—that an essential element of the charged offense was not proved at trial.

C. Sufficiency of the Evidence

Petitioner next contends that since the government did not produce evidence of drug quantity and that issue was not presented to the jury, an essential element of the charged offense was missing from the trial proof and the evidence is insufficient to support the conviction; he thus argues that he cannot be retried. In essence, petitioner argues that drug quantity must be treated as an additional essential element in light of Apprendi. The Court rejects this proposition. The jury was required to find the essential elements of the crimes with which Enigwe was charged—i.e., the elements of the offenses of importation and trafficking in heroin; it need not have found drug quantity as the drug quantity in this case did not "increase[] the penalty for [the] crimes[s] beyond the prescribed statutory maximum." Apprendi, 530 U.S. at 490.

The Court notes that petitioner previously challenged the sufficiency of the evidence in this case in his Motion for Judgment of Acquittal, or, in the Alternative, for New Trial (Document No. 50, filed August 21, 1992). As set forth in this Court's Memorandum of

December 9, 1992, "sufficient evidence was produced as to each element of the offenses charged . . . ." United States v. Enigwe, 1992 WL 382325, at *4 (E.D. Pa. Dec. 9, 1992), aff'd United States v. Enigwe, 26 F.3d 124 (3d Cir. 1994).[7] Because this Court and the Third Circuit have already held that the evidence presented at trial was sufficient to find that "defendant knowingly, willfully and voluntarily conspired with individuals, both known and unknown, to import heroin into the United States," United States v. Enigwe, 1992 WL 382325, at *4, and this Court having determined that Apprendi does not require the Court to submit drug quantity to a jury in this case, the Court concludes that Enigwe's arguments with respect to sufficiency of the evidence presented at trial do not provide a basis for the relief requested and petitioner's § 2255 motion is denied on this ground.

D. Resentencing

Finally, Enigwe argues that the Court's application of a four-level enhancement pursuant to § 3B1.1(a) of the Sentencing Guidelines for his role in the offense without it being charged in the indictment or submitted to the jury violates Apprendi.[8] As discussed supra, Enigwe was

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[7] See also In re Ifedoo Noble Enigwe, No. 00-1278 (3d Cir. May 26, 2000) (unreported) (denying petitioner's application to file a second or successive § 2255 petition on the grounds of newly discovered evidence). In its denial, the Third Circuit wrote that the allegedly newly discovered evidence was insufficient in light of the evidence submitted at trial, which included, inter alia: "(1) Two co-conspirators who were witnesses for the government testified that a man named 'Damien' recruited them to bring bags of Diamonds—which turned out to be heroin—into the United States; (2) Those same two witnesses—one of whom had sexual relations with Enigwe—and a DEA agent, identified Engiwe as the man they knew as 'Damien;' (3) One of the witnesses testified that she discussed the trip to bring back the diamonds with 'Damien' at a home on Masher Street, which phone records indicate belonged to Enigwe; and (4) Another government witness also identified Enigwe as the man she knew as Damien and testified that he engaged in heroin transportation."

[8] The Court notes that it applied two sentencing enhancements at petitioner's sentencing—a four-level enhancement for petitioner's role in the offense under § 3B1.1(a) and a

sentenced to 235 months, a sentence that is less than the 20 year maximum allowable sentence pursuant to § 841(b)(1)(C). In the wake of Apprendi, the Third Circuit has held that the district court's exercise of discretion in applying the Sentencing Guidelines is permissible where the sentence actually imposed does not exceed the statutory maximum. Williams, 235 F.3d at 863; Cepero, 224 F.3d at 268 n.5. Since petitioner's sentence was within the Court's discretion under the Sentencing Guidelines and does not implicate Apprendi, petitioner's § 2255 motion is denied with respect to the sentencing issues raised and petitioner's original sentence will not be disturbed.[9]

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two-level enhancement for obstruction of justice under § 3C1.1, based on this Court's determination that defendant committed perjury at trial. Since neither of these enhancements resulted in a sentence in excess of 20 years, Apprendi is not implicated.

[9] In support of his contention, Enigwe cites Turnbull v. United States, 121 S. Ct. 620 (2000), in which the Supreme Court, relying on Apprendi, vacated judgments of conviction and remanded the case for further consideration. In Turnbull, defendant Turnbull was sentenced to 400 months and defendant Clarke to 293 months—both sentences were thus in excess of the minimum statutory maximum sentences permitted pursuant to the statutes under which they were sentenced. See United States v. Turnbull, 213 F.3d 634 (4th Cir.) (unreported), rev'd, 121 S. Ct. 620 (2000). In summary, defendants Turnbull and Clarke were charged with the following crimes as part of a twenty-five count indictment: violations of 21 U.S.C. § 963 (Count One—conspiracy to import cocaine and cocaine base; maximum sentence under § 960(b)(3) is 20 years); 21 U.S.C. § 846 (Count Two—conspiracy to distribute cocaine and cocaine base; maximum sentence under § 841(b)(1)(C) is 20 years); 18 U.S.C. § 1956(h) (Count Three—conspiracy to launder money; maximum term of imprisonment under § 1956(a)(1) is 20 years); 21 U.S.C. §§ 952, 960 (Count Twenty-Three—importation of cocaine; maximum sentence under § 960(b)(3) is 20 years); 21 U.S.C. §§ 952, 960, 963 (Count Twenty-Four and Count Twenty-Five (against Clarke only)—attempted importation of cocaine; maximum sentence under § 960(b)(3) is 20 years); 18 U.S.C. § 1956(a)(1)(A)(i) (multiple counts of money laundering against each defendant; maximum sentence under § 841(b)(1)(C) is 20 years). Significantly, the lowest statutory maximum sentence for each of the offenses charged in Turnbull is 20 years imprisonment. Thus, Turnbull's and Clarke's sentences were "beyond the prescribed statutory maximum," and Apprendi, 530 U.S. at 490, is applicable.

III. CONCLUSION

For the foregoing reasons, defendant's Pro Se 28 U.S.C. 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 292) is denied.

BY THE COURT:

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JAN E. DUBOIS, J.